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Let's All Go To The Movies, and Put An End to Disability Discrimination: Oregon Paralyzed Veterans Of America v. Regal Cinemas, Inc. Requires Comparable Viewing Angles For Wheelchair Seating

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NOTE

LET'S ALL GO TO THE MOVIES, AND PUT AN END TO DISABILITY DISCRIMINATION:

OREGON PARALYZED VETERANS OF AMERICA V. REGAL CINEMAS, INC. REQUIRES COMPARABLE VIEWING ANGLES FOR WHEELCHAIR SEATING

INTRODUCTION

Imagine for a moment that it is a Friday night and you and a friend decide to see the hottest new movie. You arrive at the state-of-the-art theater, purchase your tickets, some popcorn and a drink. You then head inside the theater to find a seat. As the two of you walk in, you realize that the place is packed. Disappointment washes over your face as you reluctantly notice that the only seats left are right in the front row. So, you sit down, crane your neck back to see the whole screen, and try to focus on the flashing advertisements soliciting the anxious theater patrons. The excitement that initially led you to the movie theater in the first place has all but dissipated as you realize that you will be in this position for the next couple of hours. To compensate, you slouch in your seat and try to make the best of it. What if you couldn't improve your vision by slouching in your seat? What if every time you went to see a movie, this was where you would be forced to sit? To disabled

moviegoers who are in wheelchairs, this is not a meaningless hypothetical, but harsh reality.¹

In the mid-1990s, designs for movie theaters began implementing stadium-style seating.² A stadium-style theater differs in many ways from the traditional incline or sloped-auditorium design.³ Stadium-style theaters more closely resemble the design and seating configuration of a sports stadium or arena that provides stepped-seating rising at a slope greater than five percent.⁴ Like a stadium, each step contains a row of seats, and the steps ascend "all the way to the back (top) of the auditorium."⁵ Unlike the traditional design, in stadium-style theaters the entrance is typically at the front of the auditorium (bottom of the steps) rather than at the rear (top of the steps).⁶ The main purpose behind this newer elevated-seating configuration of stadium-style theaters is to combat the traditional line-of-sight problems that result from the customary inclined-theater design, i.e., the frustration and dissatisfaction felt by shorter individuals when taller individuals sit in front of them.⁷ The stadium-style design purports to offer a heightened movie-watching experience with unobstructed views of the screen.⁸ Since the stadium riser section of the theater is not wheelchair-accessible, wheelchair-bound patrons are forced to sit in the front row and thereby placed at a viewing disadvantage.⁹

¹ See generally *Or. Paralyzed Veterans of Am. v. Regal Cinemas, Inc.*, 339 F.3d 1126 (9th Cir. 2003), petition for cert. filed, 72 U.S.L.W. 3310 (U.S. Oct. 27, 2003) (No. 03-641); *Lara v. Cinemark USA, Inc.*, 207 F.3d 783 (5th Cir. 2000); *United States v. Hoyts Cinemas Corp.*, 256 F. Supp. 2d 73 (D. Mass. 2003); *Meineker v. Hoyts Cinemas Corp.*, No. 02-9034, 2003 WL 21510423 (2nd Cir. July 1, 2003).

² *Or. Paralyzed Veterans of Am. v. Regal Cinemas, Inc.*, 339 F.3d 1126, 1132 (9th Cir. 2003), petition for cert. filed, 72 U.S.L.W. 3310 (U.S. Oct. 27, 2003) (No. 03-641) [hereinafter *Regal Cinemas II*]. See also, Scott Williams, *Movie Seating Options Called Lacking For Wheelchair Users*, Milwaukee Journal Sentinel, Sept. 30, 2003, available at <http://www.jsonline.com/news/wauk/sep03/173588.asp> (last visited Feb. 15, 2004).

³ *Lara v. Cinemark USA, Inc.*, No. EP-97-CA-502-H, 1998 WL 1048497, at *1 (W.D.Tex. Aug. 21, 1998) [hereinafter *Lara I*].

⁴ *Lara v. Cinemark USA, Inc.*, 207 F.3d 783, 785 (5th Cir. 2000) [hereinafter *Lara II*].

⁵ *Lara I*, 1998 WL 1048497, at *1.

⁶ *Id.*

⁷ *Lara II*, 207 F.3d at 785.

⁸ *Regal Cinemas II*, 339 F.3d at 1127.

⁹ *Id.*

The disadvantage wheelchair-bound patrons experience due to the stadium-style theater design is physical discomfort.¹⁰ Since wheelchair-bound patrons are generally forced to sit in the front rows of movie theaters, disabled patrons must stretch their necks back into an uncomfortable position just to view the screen.¹¹ As a result of sitting in these positions for an extended period of time, these patrons experience dizziness, nausea, headaches, and blurred vision.¹² Disabled patrons claim they are the targets of unlawful discrimination as a result of being forced into these less advantageous seats.¹³

In an effort to alleviate discrimination of this sort against individuals with disabilities, Congress passed the Americans with Disabilities Act (hereinafter "ADA").¹⁴ Title III of the ADA prohibits disability-based discrimination in public accommodations, such as movie theaters.¹⁵ To ensure that all individuals equally enjoy the movie-watching experience, disabled patrons must be afforded "lines of sight comparable" to those offered to non-disabled moviegoers.¹⁶

Several suits have arisen attacking the stadium-style theater design as discriminatory against wheelchair-bound patrons due to non-compliance with ADA regulations.¹⁷ Section

¹⁰ *Id.* at 1128.

¹¹ See generally *Regal Cinemas II*, 339 F.3d 1126; *Lara II*, 207 F.3d 783; *Hoyts Cinemas*, 256 F. Supp. 2d 73; *Meineker*, 2003 WL 21510423. This general assertion regarding the placement of wheelchair seating at the front of most stadium-style theaters stems from the information set out in the cases discussed in this Note.

¹² *Regal Cinemas II*, 339 F.3d at 1128.

¹³ See *Regal Cinemas II*, 339 F.3d 1126; *Lara II*, 207 F.3d 783; *Hoyts Cinemas*, 256 F. Supp. 2d 73; *United States v. AMC Entertainment, Inc.*, 232 F. Supp. 2d 1092 (C.D. Cal. 2002); *Meineker*, 2003 WL 21510423.

¹⁴ 42 U.S.C. § 12101(b)(1) (2000).

¹⁵ 42 U.S.C. § 12182(a) (2000). "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." *Id.* In relevant part, public accommodations are defined as a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment. 42 U.S.C. § 12181(7)(C) (2000).

¹⁶ 28 C.F.R. pt. 36, app. A, § 4.33.3 (2003).

¹⁷ See *Regal Cinemas II*, 339 F.3d 1126; *Lara II*, 207 F.3d 783; *Hoyts Cinemas*, 256 F. Supp. 2d 73; *AMC Entertainment, Inc.*, 232 F. Supp. 2d 1092; *Meineker*, 2003 WL 21510423.

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4.33.3 of the ADA Accessibility Guidelines (hereinafter "ADAAG"), states that "[w]heelchair areas shall be an integral part of any fixed seating plan and shall be provided so as to provide people with physical disabilities a choice of admission prices and *lines of sight comparable* to those for members of the general public."¹⁸ Specifically, the issue surrounding these suits is the meaning of lines of sight comparable. Advocates for the disabled argued that the "lines of sight" language required taking into account the viewing angles of patrons.¹⁹ A contention, that if validated, would cause many theaters, undoubtedly, to find themselves out of compliance with ADA regulations.²⁰ After all, the viewing-angles disparity is too great to ignore.²¹ On one hand, able-bodied patrons can view a movie comfortably from a variety of seats. A majority of these seats do not require even the slightest arching of the neck to view the screen. Disabled patrons, on the other hand, are forced to sit in the front row because most theaters fail to provide alternative seating. As a result of such inadequate accommodations, disabled patrons are forced to arch their necks back to view the movie, thereby suffering a series of physical discomforts.²²

Recently, the Ninth Circuit Court of Appeals decided this exact issue in favor of disabled moviegoers.²³ In *Oregon Paralyzed Veterans of America v. Regal Cinemas, Inc.*, the court held that viewing angles must be taken into account when assessing comparability of lines of sight.²⁴ In doing so, the Ninth Circuit created a circuit split with the Fifth Circuit, which decided the issue three years before in favor of theater owners.²⁵ In *Lara v. Cinemark USA, Inc.*, the Fifth Circuit held that lines of sight

¹⁸ See 28 C.F.R. pt. 36, app. A, § 4.33.3 (2003) (emphasis added).

¹⁹ See generally *Regal Cinemas II*, 339 F.3d 1126; *Lara II*, 207 F.3d 783; *Hoyts Cinemas*, 256 F. Supp. 2d 73; *Meineker*, 2003 WL 21510423.

²⁰ *Regal Cinema II*, 339 F.3d at 1134 (Kleinfeld, J., dissenting).

²¹ See *Regal Cinemas II*, 339 F.3d at 1128.

²² See *Id.*

²³ See *Id.* at 1133.

²⁴ *Id.*

²⁵ See *Lara II*, 207 F.3d 783.

did not encompass viewing angles, and instead required only that views to the screen be unobstructed.²⁶

Although times are changing and technology is advancing in more ways than people can keep track of, it is important to ensure that these achievements do not come at the expense of discrimination. This Note contends that the Ninth Circuit was correct in finding that in order to ensure comparable lines of sight for disabled and non-disabled patrons, viewing angles must be taken into account.²⁷ Part I provides a general background of Title III of the ADA, and specifically addresses section 4.33.3 of the ADAAG and its history.²⁸ Additionally, Part I examines the Fifth Circuit's decision in *Lara*, as it played a major role in the outcome of the Ninth Circuit's decision in *Regal*.²⁹ Part II analyzes both the majority and the dissenting opinions offered in *Regal*.³⁰ Part III defends the majority opinion in *Regal* through a critique of the *Regal* dissent.³¹ Part IV discusses other cases arguing the same issues, taking the Fifth Circuit's decision in *Lara* into consideration.³² Lastly, Part V concludes that the Ninth Circuit was correct in ruling that a valid interpretation of section 4.33.3 of the ADAAG includes a viewing-angle consideration.³³

²⁶ *Id.* at 789. Recently, the Sixth Circuit had a chance to deal with the issue as well. See *United States v. Cinemark USA, Inc.*, 348 F.3d 569 (6th Cir. 2003). In that case, the Sixth Circuit like the Ninth Circuit disagreed with the reasoning of the *Lara* court, and concluded that the "lines of sight comparable" language "clearly requires more points of similarity than merely an unobstructed view." *Id.* at 579. Since, the Sixth Circuit is in accord with the Ninth Circuit, the Sixth Circuit's decision will not be discussed in this Note.

²⁷ *Regal Cinemas II*, 339 F.3d at 1133.

²⁸ See *infra* notes 34-48 and accompanying text.

²⁹ See *infra* notes 49-72 and accompanying text.

³⁰ See *infra* notes 73-137 and accompanying text.

³¹ See *infra* notes 138-183 and accompanying text.

³² See *infra* notes 184-226 and accompanying text.

³³ See *infra* notes 227-229 and accompanying text.

I. BACKGROUND

A. THE AMERICANS WITH DISABILITIES ACT

Congress passed the ADA recognizing that disabled individuals continuously suffer from discrimination, isolation, segregation, and a lack of physical access to various services and facilities.³⁴ In order to preserve the civil rights and liberties of handicapped and disabled people, the ADA provides “a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”³⁵ Title III of the ADA prohibits disability-based discrimination in public accommodations, and generally requires that public accommodations and commercial facilities designed and constructed for first occupancy after January 26, 1993, be “readily accessible to and usable by individuals with disabilities.”³⁶

In 1991, Congress prompted the Department of Justice (hereinafter “DOJ”) to issue a set of regulations providing substantive standards applicable to facilities covered under Title III.³⁷ Consistent with a Congressional mandate, the DOJ adopted a set of guidelines promulgated by the Architectural and Transportation Barriers Compliance Board (hereinafter “Access Board”).³⁸ Aside from advising and providing technical assistance to individuals or entities with rights and duties under Titles II and III of the ADA, the Access Board is a body charged with “establish[ing] and maintain[ing] minimum guidelines and requirements for the standards issued pursuant to” Title III of the ADA.³⁹ Together the Access Board and DOJ issued the ADAAG.⁴⁰ Within the stadium-style movie theater context, the relevant provision of the ADAAG in dispute is sec-

³⁴ 42 U.S.C. § 12101(a)(1)-(3),(5) (2000).

³⁵ 42 U.S.C. § 12101(b)(1) (2000).

³⁶ 42 U.S.C. § 12183(a)(1) (2000). The ADA specifically states that public accommodations include movie theaters. 42 U.S.C. § 12181(7)(C) (2000).

³⁷ 42 U.S.C. § 12186(b) (2000).

³⁸ 42 U.S.C. § 12186(c) (2000). *See also* 42 U.S.C. § 12204 (2000). “The Access Board is an independent Federal agency devoted to accessibility for people with disabilities. It operates with about 30 staff and a governing board of representatives from Federal departments and public members appointed by the President.” The Access Board website, *available at* <http://www.access-board.gov/indexes/aboutindex.htm> (last visited Feb. 15, 2004).

³⁹ 29 U.S.C. § 792(b)(2), (3)(B) (2000).

⁴⁰ 28 C.F.R. § 36.406(a) (2003); *see also* 28 C.F.R. pt. 36, app. A. (2003).

tion 4.33.3, which deals with the placement of wheelchair seating in assembly areas.⁴¹ Section 4.33.3 states in relevant part, “[w]heelchair areas shall be an integral part of any fixed seating plan and shall be provided so as to provide people with physical disabilities a choice of admission prices and *lines of sight comparable* to those for members of the general public.”⁴²

At issue in the cases discussed in this Note is the meaning of the regulatory language “lines of sight comparable” contained in section 4.33.3.⁴³ The DOJ interpreted the “lines of sight” language to require that viewing angles for patrons in the wheelchair seating of stadium-style theaters be comparable (similar or equivalent) to the viewing angles offered to the general public.⁴⁴ The DOJ publicly announced this interpretation in several amicus briefs in attempts to settle particular cases.⁴⁵ The Access Board acknowledged the DOJ’s new interpretation of section 4.33.3 in its proposed rules.⁴⁶ The Access Board

⁴¹ 28 C.F.R. pt. 36, app. A, § 4.33.3 (2003).

⁴² *Id.* (emphasis added). Section 4.33.3 further states: They shall adjoin an accessible route that also serves as a means of egress in case of emergency. At least one companion fixed seat shall be provided next to each wheelchair seating area. When the seating capacity exceeds 300, wheelchair spaces shall be provided in more than one location. Readily removable seats may be installed in wheelchair spaces when the spaces are not required to accommodate wheelchair users. EXCEPTION: Accessible viewing positions may be clustered for bleachers, balconies, and other areas having sight lines that require slopes of greater than 5 percent. Equivalent accessible viewing positions may be located on levels having accessible egress. *Id.*

⁴³ *Id.*

⁴⁴ Brief for the United States as Amicus Curiae Supporting Appellants and Urging Reversal at 10, *Or. Paralyzed Veterans of Am. v. Regal Cinemas, Inc.*, 339 F.3d 1126 (9th Cir. 2003) (No. 01-35554) [hereinafter *Appellants Brief Urging Reversal*].

⁴⁵ See *Appellants Brief Urging Reversal* at 10; Brief for the United States as Amicus Curiae in Support of Appellees Urging Affirmance at 14, *Lara v. Cinemark USA, Inc.*, 207 F.3d 783 (5th Cir. 2000) (No. 99-50204) [hereinafter *Appellees Brief Urging Affirmance*]. An amicus brief is a brief written by an amicus curiae, which is Latin for “friend of the court.” Amicus curiae is “[a] person who is not a party to a lawsuit but who petitions the court or is requested by the court to file a brief in the action because that person has a strong interest in the subject matter.” BLACK’S LAW DICTIONARY 66 (7th ed. Abridged 2000).

⁴⁶ See ADDAG for Buildings and Facilities, 64 Fed. Reg. 62,248, 62,278 (Access Board Nov. 16, 1999).

stated that it would consider requirements in the final rule that would harmonize the DOJ's interpretation of the regulation as it applied to stadium-style movie theaters.⁴⁷ The rule, however, has not been amended to incorporate the DOJ's concerns.⁴⁸

B. COMPARABLE LINES OF SIGHT REQUIRES ONLY AN UNOBSTRUCTED VIEW

Although the stadium-style theater design was in use for only a couple of years, disabled moviegoers in Texas were the first to realize the new design's failure to offer them equal enjoyment of the movie-watching experience.⁴⁹ The first case to challenge the stadium-style design was *Lara v. Cinemark USA, Inc.*⁵⁰ In December 1997, a group of disabled persons and advocacy groups brought a civil action in the United States District Court for the Western District of Texas against the owner of Tinseltown USA, a movie theater complex.⁵¹ In *Lara*, the plaintiffs alleged that the twenty-screen stadium-style movie theater complex did not comply with ADA standards.⁵² Moreover, the plaintiffs claimed that eighteen Tinseltown theaters were in violation of 42 U.S.C. section 12182(a) and section 4.33.3 of the ADAAG because the wheelchair seating provided

⁴⁷ *Id.* [The] DOJ has asserted in attempting to settle particular cases that wheelchair seating locations must: (1) Be placed within the stadium-style section of the theater, rather than on a sloped floor or other area within the auditorium where tiers or risers have not been used to improve viewing angles; (2) provide viewing angles that are equivalent to or better than the viewing angles ... provided by 50 percent of the seats in the auditorium, counting all seats of any type sold in that auditorium; and (3) provide a view of the screen, in terms of lack of obstruction (e.g., a clear view over the heads of other patrons), that is in the top 50 percent of all seats of any type sold in the auditorium. The Board is considering whether to include specific requirements in the final rule that are consistent with DOJ's interpretation of 4.33.3 to stadium-style movie theaters. *Id.*

⁴⁸ See 28 C.F.R. pt. 36, app. A, § 4.33.3 (2003).

⁴⁹ See *Lara I*, 1998 WL 1048497, at *1.

⁵⁰ *Lara II*, 207 F.3d 783.

⁵¹ See *Lara I*, 1998 WL 1048497, at *1. The plaintiffs in this action are seven individuals consisting of Jose G. Lara, E.J. Lozano, Alfred Juarez, G. Tim Hervey, Earl L. Harbeck, Luis Enrique Chew, and Myra Murillo, and two advocacy groups for people with disabilities consisting of the Volar Center for Independent Living and Desert Adapt. *Id.* The plaintiffs sought damages and injunctive and declarative relief. *Id.*

⁵² *Id.*

in the front of the auditorium did not offer comparable lines of sight to those provided to non-disabled theater patrons.⁵³

In a case of first impression, the district court in *Lara* discussed the application of 42 U.S.C. section 12182(a) and section 4.33.3 to a stadium-style theater.⁵⁴ Like most stadium-style theaters, Tinseltown's theaters provide one entrance located at the front of the theater, directly in front of the movie screen.⁵⁵ Accordingly, Tinseltown's designated wheelchair row was located on the same level as the entrance, in the front row of the overall seating.⁵⁶ The plaintiffs complained "that viewing the movie screen from the level of the entrance is very awkward and uncomfortable, because it is too close to the screen and too far below its [the screen's] level."⁵⁷ The precarious placement of the wheelchair row forced wheelchair-bound patrons to raise their eyes and crane their necks at extremely uncomfortable angles just to watch the movie.⁵⁸

Plaintiffs interpreted the word "comparable," as used in section 4.33.3 of the ADAAG, to mean that seating for wheelchair-bound patrons must provide those patrons with lines of sight similar or equivalent to those available to non-disabled patrons, assuring that disabled moviegoers are not relegated to the worst seats in the auditorium.⁵⁹ The district court agreed, holding that Tinseltown theaters did not afford patrons with comparable lines of sight.⁶⁰ The court stated that as a result of their discomfort, wheelchair-bound patrons are "denied the full

⁵³ *Id.* at *2. The design of the other two theaters are not an issue in this case, since both have a second entrance at the back of the auditorium that is wheelchair accessible by means of an elevator, and allows for a wheelchair row located at the rear of the auditorium. *Id.* at *1, n.1-2.

⁵⁴ *Id.* at *2.

⁵⁵ See *supra* note 6 and accompanying text.

⁵⁶ *Lara I*, 1998 WL 1048497, at *1.

⁵⁷ *Id.*

⁵⁸ *Id.* at *2. "The average viewing angle from this row is above thirty-five degrees, which the Plaintiffs' expert witness has properly described as 'well into the discomfort zone'." *Id.*

⁵⁹ *Id.* Indeed, comparable is defined as "capable of or suitable for comparison; equivalent, similar." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 267 (1984).

⁶⁰ *Id.*

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and equal enjoyment of the movie going experience in these eighteen theaters” as compared to the average patron.⁶¹ The court concluded that the defendant’s theaters violated the ADA and the ADAAG, and were subsequently ordered to modify the eighteen theaters accordingly.⁶²

The victory, however, for these wheelchair-bound movie buffs was short-lived. In April 2000, the United States Court of Appeals for the Fifth Circuit reversed the district court’s decision.⁶³ In its opinion, the court of appeals stated that until now, no court questioned whether section 4.33.3 required comparable viewing angles for wheelchair-bound patrons as compared to the general public.⁶⁴ Although the DOJ filed two amicus briefs outlining their interpretation of section 4.33.3,⁶⁵ the court found that the DOJ and Access Board did not explicitly consider issues surrounding viewing angles prior to enacting section 4.33.3, and that the Access Board only recently considered revising the section to include such requirements.⁶⁶ Further, the court looked to the meaning of “lines of sight” as inter-

⁶¹ *Id.*

⁶² *Lara v. Cinemark USA, Inc.*, No. EP-97-CA-502-H, 1999 WL 305108, at *2 (W.D.Tex. Feb. 4, 1999). Plaintiffs motion for summary judgment was granted. *Lara I*, 1998 WL 1048497, at *3. Plaintiffs Jose G. Lara, Alfredo Juarez, Earl L. Harbeck, Luis Enrique Chew, and Myra Murillo were each awarded \$100 under the Texas Human Resources Code, §121.004(b). *Lara v. Cinemark USA, Inc.*, No. EP-97-CA-502-H, 1999 WL 305108, at *3 (W.D.Tex. Feb. 4, 1999). Plaintiffs G. Tim Hervey (not wheelchair-bound) and E.J. Lozano (blind) were awarded no damages, since it is not clear they were affected by the defendant’s noncompliance. *Id.* Plaintiff Margarita Lightbourne-Harbeck is not mentioned in the result. *Id.* Further, all plaintiffs were entitled to attorney’s fees and the court directed plaintiffs to file the requisite motions within fourteen days from the entry of the judgment. *Id.* Modifications included moving the wheelchair seating farther away from the screen and higher off the floor, as well as lowering the height of the screen by approximately one foot. *Lara II*, 207 F.3d at 785. Although directing these modifications to be made, it was not explicitly stated how wheelchair-bound patrons would get to these newly provided spaces located further from the screen and higher from the ground.

⁶³ *Lara II*, 207 F.3d 783.

⁶⁴ *Id.* at 788. However, the court did note that whether lines of sight for wheelchair seating needed to be unobstructed by standing spectators under section 4.33.3 was an issue that several courts had already undertaken. *Id.*

⁶⁵ See *Appellees Brief Urging Affirmance* at 14. In *Lara*, the DOJ submitted one amicus brief at the district court level and one at the appellate level. *Id.* Although not published, “the Civil Rights Division of the United States Department of Justice was allowed by the Court to file a brief as amicus curiae.” *Lara I*, 1998 WL 1048497, at *1.

⁶⁶ *Lara II*, 207 F.3d at 788. The court further noted that “while the DOJ’s 1994 Technical Assistance Manual explicitly requires theaters to provide ‘lines of sight over spectators who stand,’ the manual does not address problems involving viewing angles.” *Id.*

preted in other contexts and concluded that the phrase meant “unobstructed view.”⁶⁷

Writing for the Fifth Circuit, Judge W. Eugene Davis held that section 4.33.3 does not impose a requirement affording disabled patrons the same viewing angles available to non-disabled patrons.⁶⁸ Instead, Judge Davis stated that the regulations mandated only that the patrons’ view of the screen be unobstructed.⁶⁹ According to the court, “[t]o impose a viewing angle requirement at this juncture would require district courts to interpret the ADA based upon the subjective and undoubtedly diverse preferences of disabled moviegoers.”⁷⁰ Since Tinseltown’s theaters provided the wheelchair-bound patrons *unobstructed* lines of sight, the Fifth Circuit Court of Appeals found that defendants were in compliance with ADA regulations.⁷¹ On October 16, 2000, the United States Supreme Court denied the plaintiffs’ petition for writ of certiorari.⁷² By this time, however, a case in an Oregon district court was already under way presenting the same issue that the Fifth Circuit decided in *Lara*.

⁶⁷ *Id.* at 788-89. To interpret the language “lines of sight,” the court used the following federal regulations: “See, e.g., 47 C.F.R. § 73.685 (2000) (FCC regulation requiring that antennae have line of sight, without obstruction, of the communities that they serve); 46 C.F.R. § 13.103 (2000) (defining direct supervision as having line of sight of the person being supervised); 36 C.F.R. § 2.18 (2000) (forbidding people under age 16 from operating snowmobiles unless they are “within line of sight” of a reasonable person over age 21).” *Id.*

⁶⁸ *Lara II*, 207 F.3d at 789.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Lara II*, 207 F.3d 783, *cert. denied*, 531 U.S. 944 (2000).

II. COMPARABLE LINES OF SIGHT REQUIRE COMPARABLE VIEWING ANGLES

In April 2000, the Oregon Paralyzed Veterans of America, along with Kathy Stewmon, Tina Smith, and Kathy Braddy, brought three claims in the United States District Court for the District of Oregon, against Regal Cinemas, Inc.⁷³ In *Oregon Paralyzed Veterans of America v. Regal Cinemas, Inc.*,⁷⁴ plaintiffs asserted that the wheelchair seat locations within six of Regal's theaters failed to comply with ADA requirements.⁷⁵ Once again, the meaning of "lines of sight comparable" was at the heart of this lawsuit, because similar to Tinseltown's theaters in *Lara*, Regal's theaters employed stadium-style seating configurations.⁷⁶ The plaintiffs in *Regal* argued that "these words impose a viewing angle standard such that wheelchair seating areas must be placed in the stadium seating portion of theaters and not just in the front rows of a theater that provide inferior and uncomfortable viewing angles."⁷⁷

The plaintiffs adopted the DOJ's position concerning section 4.33.3 of the ADAAG as offered during *Lara* and outlined in their amicus briefs.⁷⁸ Despite the Fifth Circuit's rejection of the DOJ's new interpretation, the plaintiffs asked the Oregon

⁷³ Or. Paralyzed Veterans of Am. v. Regal Cinemas, Inc., 142 F. Supp. 2d. 1293, 1294 (D. Or. 2001) [hereinafter *Regal Cinemas I*]. Eastgate Theatre Inc., d/b/a Act III Theaters, Inc was also named as a defendant in the action, however, since the district court referred to the defendants collectively as "Regal", this Note will do the same. *Id.*

⁷⁴ *Regal Cinemas II*, 339 F.3d 1126.

⁷⁵ *Regal Cinemas I*, 142 F. Supp. 2d. at 1294. "The plaintiffs also claimed that the seating plans violate Oregon's public accommodations statute, Or.Rev.Stat. § 659.425(3), and claimed negligence in the design, construction, and operation of the stadium-riser theaters. They sought declaratory and injunctive relief, compensatory and punitive damages under the Oregon statute, and damages for negligence (in an amount to be proved at trial), in addition to attorneys' fees and costs." *Regal Cinemas II*, 339 F.3d at 1127. After the district court granted summary judgment to the defendants on all three claims, plaintiffs only appealed the ADA claim. *Id.* Accordingly, this Note will only discuss the ADA claim.

⁷⁶ *Regal Cinemas I*, 142 F. Supp. 2d. at 1294-1295.

⁷⁷ *Id.* at 1295. Accordingly, both parties filed motions for summary judgment. *Id.* at 1294.

⁷⁸ *Id.* at 1296. The new interpretation of section 4.33.3 "required the following in stadium-style theaters: 'wheelchair locations must be provided lines of sight in the stadium seating seats within the range of viewing angles as those offered to most of the general public in the stadium style seats, adjusted for seat tilt.'" *Id.*

court to adopt the DOJ's litigating position in *Lara* as its latest interpretation of section 4.33.3.⁷⁹

Although the Oregon district court admitted it was tempted to follow the reasoning of the Texas district court in *Lara*, making its decision based on the plain meaning of the regulation,⁸⁰ the court ultimately followed the Fifth Circuit's reasoning.⁸¹ Not only was the district court persuaded by the regulation's history and "the context in which it was promulgated," but also by the fact that stadium-style theater design did not come into effect until 1995, four years after the DOJ adopted section 4.33.3.⁸² The district court did not defer to the DOJ's interpretation of section 4.33.3 and further stated that, "it would be unreasonable and inconsistent with the history of Section 4.33.3 (including statements by the Access Board) to interpret it to require stadium-style theaters to provide wheelchair-bound moviegoers with comparable viewing angles."⁸³ The district court was not confident that an amicus brief was an appropriate way to announce an agency's interpretation of a rule.⁸⁴ The court further noted that establishing appropriate

⁷⁹ *Id.* at 1296.

⁸⁰ *Id.* at 1296-97, quoting *Lara I*, 1998 WL 1048497, at *2. Plain meaning was a term coined by the district court in *Regal*, which described the district court's analysis in *Lara*, interpreting the language of section 4.33.3 "in their common, ordinary, English language, dictionary meaning." *Id.* Plain meaning is additionally defined as the meaning attributed to a document (usually by a court) based on a commonsense reading of the words, giving them their ordinary sense and without reference to extrinsic indications of the author's intent. BLACK'S LAW DICTIONARY 796 (7th ed. Abridged 2000).

⁸¹ *Regal Cinemas I*, 142 F. Supp. 2d. at 1297.

⁸² *Id.* Of great importance to the Oregon district court was the fact that in 1994, the DOJ stated in its Technical Assistance Manual the requirement that certain auditoriums must provide unobstructed lines of sight over patrons who stand, but mentioned nothing about viewing angles. *Id.* Since § 4.33.3 was advanced in 1991 and stadium-style theaters didn't come about until 1995, the court felt that was dispositive of the fact that the regulation could not and did not speak to the issue of lines of sight in stadium-style movie theaters. *Id.* The fact that the Access Board did not consider such concepts as viewing angles in stadium-style seating until 1999, provided more strength for the court's argument in siding with the Fifth Circuit. *Id.*

⁸³ *Id.* at 1297-98.

⁸⁴ *Id.* at 1297.

viewing-angle standards is a task better left to “notice and comment rulemaking rather than through an interpretive rule.”⁸⁵ Accordingly, summary judgment was granted in favor of defendants.⁸⁶

A. THE *REGAL* MAJORITY

On appeal, Judge Betty Fletcher, writing for the majority of the Ninth Circuit Court of Appeals, disagreed with the district court and reversed its findings.⁸⁷ First, the majority disagreed with the Fifth Circuit’s reasoning (so heavily relied upon by the district court), which claimed that to analyze comparability in such terms would require delving into the subjective seating preferences of moviegoers.⁸⁸ The Ninth Circuit relied on the engineering guidelines of the Society of Motion Picture and Television Engineers (hereinafter “SMPTE”).⁸⁹ The SMPTE established exact points at which most viewers reached a point of physical discomfort.⁹⁰ Based on the SMPTE guidelines, the Ninth Circuit reasoned that the physical dis-

⁸⁵ *Id.* at 1298 n.2. The full quotation from the district court is as follows: “[T]he vague viewing angle standards cited in the record cry out for a detailed methodology that would best be developed and imposed through notice and comment rulemaking rather than through an interpretive rule.” *Id.* The court did not elaborate on this point, however the court was most likely concerned that this type of change was better suited for the legislation to handle. *Id.*

⁸⁶ *Id.* at 1298. Summary judgment was also granted against the plaintiffs on each of their other two claims. *Regal Cinemas II*, 339 F.3d at 1127.

⁸⁷ *Id.* at 1127. The plaintiffs only appealed the district court’s ruling on the ADA claim. *Id.* Further, only the individual plaintiffs filed the appeal. *Id.* at 1127 n.1. Oregon Paralyzed Veterans of America did not join in the appeal. *Id.*

⁸⁸ *Regal Cinemas II*, 339 F.3d at 1132 n.7.

⁸⁹ *Id.* at 1128. “SMPTE was founded in 1916 to advance theory and development in the motion imaging field. Today, SMPTE publishes ANSI-approved Standards, Recommended Practices, and Engineering Guidelines, along with the highly regarded SMPTE Journal and its peer-reviewed technical papers.” Society of Motion Picture and Television Engineers, available at <http://www.smpete.org/membership/> (last visited Feb. 15, 2004). SMPTE goals include developing industry standards, communicating the latest developments in technology, enhancing education, and promoting networking and interaction. *Id.*

⁹⁰ *SMPTE: Engineering Guideline: Design of Effective Cine Theaters*, 5 (1994). “For most viewers, physical discomfort occurs when the vertical viewing angle to the top of the screen exceeds 35 [degrees], and when the horizontal line of sight measured between a perpendicular to [the viewer’s] seat and the centerline of the screen exceeds 15 [degrees].” *Id.*

comfort suffered by disabled patrons could be determined through objective, rather than subjective criteria.⁹¹ The court stated that although able-bodied patrons are free to choose from a wide range of “objectively comfortable” seating within stadium-style theaters, wheelchair-bound patrons do not share this freedom and are forced to sit in “objectively uncomfortable” seating in the first few rows.⁹² Further, the court stated that evidence showed the viewing angle in the defendants’ theaters is on average seven degrees higher than the 35 degree limit classified by the SMPTE as “uncomfortable.”⁹³

Second, the Ninth Circuit criticized the lower court’s failure to defer to the new interpretation of section 4.33.3 offered by the DOJ.⁹⁴ The court stated that an agency’s interpretation of its own regulations should be given substantial deference.⁹⁵ This is most important when the regulatory language is ambiguous and the agency’s interpretation is reasonable.⁹⁶ Unlike the district court, the Ninth Circuit found the DOJ’s interpretation to be reasonable based on the definition of “lines of sight,”⁹⁷ and its applicability in the movie theater context.⁹⁸ The Ninth Circuit rejected the *Lara* court’s legislative and administrative analysis of section 4.33.3.⁹⁹ The Ninth Circuit did not find the legislative and administrative history of section 4.33.3 dispositive either way, so as to compel an interpretation of “lines of sight comparable” to include viewing angles, or

⁹¹ *Regal Cinemas II*, 339 F.3d at 1132 n.7.

⁹² *Id.* The court went on to say that these seats are objectively uncomfortable for all patrons, yet the discomfort is “exacerbated for wheelchair-bound viewers relative to able-bodied viewers sitting in the same row. *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 1131.

⁹⁵ *Id.*, citing *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994).

⁹⁶ *Regal Cinemas II*, 339 F.3d at 1131, quoting *Martin v. Occupational Safety & Health Review Comm’n*, 499 U.S. 144, 150-51 (1991). “When the meaning of regulatory language is ambiguous, the agency’s interpretation of the regulation controls ‘so long as it is “reasonable,” that is, so long as the interpretation sensibly conforms to the purpose and wording of the regulations.’” *Id.*

⁹⁷ *Id.* Definition of “lines of sight” in relevant part, found to consist of “a line from an observer’s eye to a distant point (as on the celestial sphere) toward which he is looking or directing an observing instrument.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1316 (1993).

⁹⁸ *Regal Cinemas II*, 339 F.3d at 1131. “In the context of a movie theater, this means a line extending from the viewer’s eye to the points on the screen where the film is projected, taking account the angle from the viewer’s eye to those points.” *Id.*

⁹⁹ *Id.* at 1132.

not.¹⁰⁰ Instead, the Ninth Circuit declared that the issue is not whether the DOJ contemplated “viewing-angle issues in the context of stadium-style seating at the time when [section] 4.33.3 was promulgated ... [but] whether a broadly-drafted regulation -- with a broad purpose -- may be applied to a particular factual scenario not expressly anticipated at the time the regulation was promulgated.”¹⁰¹ Relying on the United States Supreme Court’s approval of this approach as to unambiguous statutory text,¹⁰² the Ninth Circuit decided to treat regulations as analogous.¹⁰³

Third, the Ninth Circuit found the district court’s hesitation towards the DOJ’s interpretation, due to the fact it came about through an amicus brief, to be unfounded.¹⁰⁴ After all, “[a]n agency’s interpretation of one of its own rules, including an interpretation expressed in an *amicus* brief, is controlling unless plainly erroneous or inconsistent with the rule.”¹⁰⁵ Finally, as additional support for rejecting the reasoning in *Lara*, the court cited *United States v. Hoyts Cinemas Corporation*,¹⁰⁶ which offered similar disapproval of the Fifth Circuit’s reasoning.¹⁰⁷

In the end, the Ninth Circuit returned to the language of the ADA and found it inconceivable that the objectively uncomfortable seating in question provided “full and equal enjoyment” of the movie-going experience by disabled patrons as it did for the general public.¹⁰⁸ Non-disabled patrons are not subject to experiencing dizziness, nausea, headaches, or blurred

¹⁰⁰ *Id.* at 1132-33.

¹⁰¹ *Id.* at 1133.

¹⁰² See *Pennsylvania Dep’t of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998) (“the fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.” (internal quotation marks omitted) (citing *S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985))).

¹⁰³ *Regal Cinemas II*, 339 F.3d at 1133.

¹⁰⁴ *Id.* at 1131 n.6.

¹⁰⁵ See *Navellier v. Sletten*, 262 F.3d 923, 945 (9th Cir. 2001) (emphasis in text).

¹⁰⁶ *Hoyts Cinemas*, 256 F. Supp. 2d. at 88 (“This Court now rules (notwithstanding the contrary reasoning in the *Lara* decision) that the comparable ‘lines of sight’ requirement of Section 4.33.3 means that viewing angles *must* be taken into account.”) For further discussion of this case see *infra* notes 186-204 and accompanying text.

¹⁰⁷ *Regal Cinemas II*, 339 F.3d at 1133 n.8.

¹⁰⁸ *Id.* at 1133.

vision as wheelchair-bound patrons are.¹⁰⁹ In view of this, the Ninth Circuit held that the DOJ's interpretation was "valid and entitled to deference."¹¹⁰ Specifically, section 4.33.3 required that the viewing angles for wheelchair-bound patrons must be "within the range of angles offered to the general public in the stadium-style seats."¹¹¹ The district court's decision was reversed and remanded with instructions to enter summary judgment in favor of the plaintiffs.¹¹²

B. THE *REGAL* DISSENT

Judge Kleinfeld's dissent disagreed with the majority for several reasons.¹¹³ First, the dissent agreed with the Oregon district court that the majority's decision will bring about a substantial change that would be better handled through an appropriate rule-making process rather than a retroactive judicial one.¹¹⁴ Second, other requirements present in the regulation limit the compliance with the majority's rule.¹¹⁵ Third, the dissent disagreed with the majority's definition of "comparable."¹¹⁶ Fourth, since a wheelchair section in the front of the theater was not prohibited before stadium seating, viewing the same regulation to prohibit the wheelchair placement after the implementation of stadium seating is illogical.¹¹⁷ Lastly, the majority decision creates a conflict with the Fifth Circuit and provides uncertainty for theater owners as to their legal obligations.¹¹⁸

Initially, Judge Kleinfeld appeared extremely troubled by the majority usurping the responsibility to solve a problem that he felt would be more aptly dealt with through the executive branch, and which indeed was already recognized as an issue

¹⁰⁹ See *supra* note 12 and accompanying text.

¹¹⁰ *Regal Cinemas II*, 339 F.3d at 1133.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ See *Regal Cinemas II*, 339 F.3d at 1134 (Kleinfeld, J., dissenting).

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 1135 (Kleinfeld, J., dissenting).

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 1137 (Kleinfeld, J., dissenting).

¹¹⁸ *Id.* at 1133 (Kleinfeld, J., dissenting).

by the Access Board as listed in their Notice of Proposed Rule-making in 1999.¹¹⁹ The dissent noted that the Access Board is “proposing to amend the guidelines to include specific technical provisions” governing sight lines.¹²⁰ The dissent further urged that “[r]egulating movie theater architecture retroactively by vague judicial fiat is unjust”¹²¹ especially given the precision with which these regulations are written.¹²²

According to the dissent, the majority ignored other requirements within the regulation that “give context to the lines of sight requirement, such as the access and emergency exit requirements.”¹²³ These requirements are present to ensure that disabled patrons are not isolated in a “wheelchair ghetto” from the other patrons and that they are able to sit next to their friends and family.¹²⁴ In addition, these requirements allow disabled patrons to get in and out of the theater, both with ease and in cases of emergency.¹²⁵ The dissent offers these other requirements as reasons wheelchair seating is located in the front, flat portion of the theater.¹²⁶

Like the Oregon district court and the Fifth Circuit, the dissent poses the question, “comparable to what?”¹²⁷ The dissent retreats to the subjective rationale of those earlier decisions.¹²⁸ Although conceding that “as a matter of geometry a line of sight will not be identical to any particular other seat,” the dissent claims that the wheelchair seating is “comparable” to the seats immediately adjacent to them.¹²⁹ Judge Kleinfeld

¹¹⁹ See ADDAG for Buildings and Facilities, 64 Fed. Reg. at 62,278.

¹²⁰ See *Id.* at 62,277.

¹²¹ *Regal Cinemas II*, 339 F.3d at 1134 (Kleinfeld, J., dissenting).

¹²² *Id.* For comparable specificity in the C.F.R. regarding wheelchair accessibility guidelines, see 28 C.F.R. pt. 36, app. A, § 4.31.8 (2003) (telephone cord length must be at least 29 in.); see also 28 C.F.R. pt. 36, app. A, § 4.32.3 (2003) (wheelchair seating knee clearance at tables and counters must be “at least 27 in (685 mm) high, 30 in (760 mm) wide, and 19 in (485 mm) deep.”).

¹²³ *Regal Cinemas II*, 339 F.3d at 1135 (Kleinfeld, J., dissenting).

¹²⁴ *Id.* See *infra* notes 149-160 and accompanying text for a discussion of the term “wheelchair ghetto.”

¹²⁵ *Regal Cinemas II*, 339 F.3d at 1135 (Kleinfeld, J., dissenting).

¹²⁶ *Id.* The other requirements of § 4.33.3 are “that wheelchair areas be ‘an integral part’ of the fixed seating plan, that they ‘adjoin an accessible route’ that also serves as an emergency exit, that they be adjacent to ‘companion’ seating, and that they have ‘lines of sight comparable to those for members of the general public.’” *Id.*, quoting 28 C.F.R. pt. 36, app. A, § 4.33.3 (2003).

¹²⁷ *Regal Cinemas II*, 339 F.3d at 1135 (Kleinfeld, J., dissenting).

¹²⁸ *Id.* at 1136 (Kleinfeld, J., dissenting).

¹²⁹ *Id.*

articulated that “comparable” means “similar or equivalent to,” and does not mean “better than” as the DOJ asserted.¹³⁰ Judge Kleinfeld expressed confusion over the DOJ’s interpretation of comparable as meaning “better than the viewing angles ... provided by 50 percent of the seats.”¹³¹

Further, the dissent fails to see how a regulation can address stadium-style seating, when the majority conceded that it was a “factual scenario not expressly anticipated at the time the regulation was promulgated.”¹³² Judge Kleinfeld goes on to state that since “regulations did not prohibit a wheelchair section in the front of the theater before [stadium seating], it is impossible to justify a construction that the very same regulation prohibits the very same wheelchair seating, with identical angles of view, after stadium seating came into use.”¹³³

The dissent is dissatisfied with the circuit split.¹³⁴ The dissent ultimately criticized the majority’s opinion for vagueness and for failing to offer guidance to theater owners regarding compliance with the law.¹³⁵ In Judge Kleinfeld’s own words, “[t]he least the majority could do in its retroactive legislative effort is offer a holding that can be translated into a floor-plan.”¹³⁶ Judge Kleinfeld postulates that he might be able to create a scheme that would satisfy the majority decision, however, he is uncertain that the design would be accepted by the majority or even that it would be the least expensive means of compliance.¹³⁷

¹³⁰ *Id.* at 1135 (Kleinfeld, J., dissenting), citing THE AMERICAN HERITAGE DICTIONARY 300 (2d ed. 1982).

¹³¹ See ADDAG for Buildings and Facilities, 64 Fed. Reg. at 62,278.

¹³² *Regal Cinemas II*, 339 F.3d at 1137 (Kleinfeld, J., dissenting), citing the majority opinion at 1133.

¹³³ *Regal Cinemas II*, 339 F.3d at 1137 (Kleinfeld, J., dissenting).

¹³⁴ *Id.* at 1136 (Kleinfeld, J., dissenting) (“A purportedly uniform federal regulation now means something different in the Ninth Circuit from what it means in the Fifth.”).

¹³⁵ *Id.* at 1136 (Kleinfeld, J., dissenting).

¹³⁶ *Id.* at 1137 (Kleinfeld, J., dissenting).

¹³⁷ *Id.* at 1134 (Kleinfeld, J., dissenting).

III. A CRITIQUE OF *REGAL*

By adopting the DOJ's interpretation of section 4.33.3, the Ninth Circuit in *Regal* advanced the goals of Title III of the ADA.¹³⁸ Due to the decision in *Regal*, viewing angles for wheelchair seating must be provided within the range of angles offered to the general public in stadium-style seating.¹³⁹ After all, ensuring that people with disabilities have access to "the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation" is the central goal of Title III.¹⁴⁰ It would be difficult to argue that a disabled moviegoer, someone already subject to physical infirmities, enjoys the overall movie-going experience as much as the average person, especially if his or her seat is unfavorably placed. Although the dissent criticizes several deficiencies within the majority opinion, most of Judge Kleinfeld's concerns are either misdirected or too narrowly construed.

A. THE MAJORITY AS RULEMAKER

The dissent began by stating that the majority's approach to this whole situation was unjust in light of the fact that the Access Board is considering creating new regulations dealing with stadium-style movie theaters.¹⁴¹ While this may be a valid concern, how long should disabled moviegoers be forced to wait for a change? In response to the DOJ's interpretation of section 4.33.3 and the frequent placement of wheelchair seating in the front rows, the Access Board published a Notice of Proposed Rulemaking in 1999 that would consider new regulations for stadium-style movie theaters.¹⁴² Although the Access Board noted the importance of providing wheelchair patrons better

¹³⁸ *Id.* at 1133 (majority opinion).

¹³⁹ *Id.*

¹⁴⁰ 42 U.S.C. § 12182(a) (2000).

¹⁴¹ *Regal Cinemas II*, 339 F.3d at 1133-34 (Kleinfeld, J., dissenting).

¹⁴² ADDAG for Buildings and Facilities, 64 Fed. Reg. at 62,278.

lines of sight, they also stated that according to design professionals, measuring compliance in regards to such concerns might prove difficult and uncertain. That was four years ago.¹⁴³

It took only two years from the advent of stadium-style theaters for a discrimination claim to be filed by the plaintiffs in *Lara*.¹⁴⁴ And, it took two years from that point for the Access Board even to recognize the DOJ's position regarding comparing lines of sight.¹⁴⁵ Now, four years later, the Access Board has done nothing about this concern. Yet, the dissent maintains that the Access Board is best suited to handle this situation in the most efficient manner.¹⁴⁶ If and when the Access Board adopts a regulation resembling the DOJ's position, the requirements under the regulation "will be clear, precise, and prospective."¹⁴⁷ In light of the Access Board's lack of diligence in addressing this issue however, the majority did the right thing and achieved the same purpose by expressly not turning its back on movie theater discrimination.

The dissent should not have criticized the majority for involving themselves in an area of concern that needed attention. In addition, the Access Board should look at the majority's decision not as an infringement on their autonomy, but instead as a call to arms. The Access Board should use the general guidelines and concerns that the majority laid out in the *Regal* decision, giving great attention to the DOJ's interpretation, and create the new regulations for stadium-style movie theaters that it said it would. Further, the Access Board's uncertainty in measuring compliance with lines-of-sight regulations is no longer a concern, given the facts surrounding comfortable viewing angles offered in the SMPTE engineering guidelines.¹⁴⁸

¹⁴³ *Id.* at 62,277.

¹⁴⁴ *See Lara I*, 1998 WL 1048497, at *1.

¹⁴⁵ ADDAG for Buildings and Facilities, 64 Fed. Reg. at 62,278.

¹⁴⁶ *Regal Cinemas II*, 339 F.3d at 1134 (Kleinfeld, J., dissenting).

¹⁴⁷ *Id.*

¹⁴⁸ *SMPTE: Engineering Guideline: Design of Effective Cine Theaters*, 5 (1994).

B. WHEELCHAIR GHETTO

Judge Kleinfeld recognized the majority's concern against having a "wheelchair ghetto" located in one portion of the theater, offering disadvantageous lines of sight compared to those of other patrons.¹⁴⁹ Despite this valid concern, Judge Kleinfeld discounted this as a chimera,¹⁵⁰ asserting that the regulation already addresses this issue.¹⁵¹ While this may or may not be true, this assertion does not determine whether the language, "lines of sight," encompasses viewing angles. In fact, the dissent concludes that the majority should not be concerned with a wheelchair ghetto since the regulation prohibits "a wheelchair ghetto out of the way, behind a post, or off to the side."¹⁵² Not only does this assume that the words, "lines of sight," exclude viewing angles, but also assumes that the only way to have a wheelchair ghetto is to segregate disabled people into their own section, or to provide them seats in which their view is obstructed.

The fact that wheelchair seating is placed in the front row, technically mingled with the general public and not separated, does not eviscerate the notion of a wheelchair ghetto. In the 1950's, African-Americans were forced to sit in the back of public buses and yield the front of the bus to whites.¹⁵³ Although the back of a bus is not technically separate from the front, we would be hard pressed to say that this disparate treatment did not amount to a form of discrimination. The flagrant discrimi-

¹⁴⁹ *Regal Cinemas II*, 339 F.3d at 1135 (Kleinfeld, J., dissenting). The term "wheelchair ghetto" is only employed by the dissent and not the majority decision. *Id.* The term "wheelchair ghetto" is meant to describe an area of a theater containing sub-standard seating as a result of the section's "sight lines [that are] worse than those [offered to] the other patrons." *Id.*

¹⁵⁰ A chimera is defined as "an illusion or fabrication of the mind; an unrealizable dream." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 233 (1984).

¹⁵¹ *Regal Cinemas II*, 339 F.3d at 1135 (Kleinfeld, J., dissenting). Judge Kleinfeld interpreted the language of § 4.33.3 of the ADAAG to mean that in those theaters where the seating capacity does not exceed 300, wheelchair seating may be grouped together rather than distributed throughout the theater, as long as the wheelchair seating is not separated from the general seating and the lines of sight are not substantially different from those offered to the general public. *Id.*

¹⁵² *Id.*

¹⁵³ *Time 100: Heroes & Icons - Rosa Parks*, available at <http://www.time.com/time/time100/heroes/profile/parks01.html> (last visited Feb. 15, 2004).

nation that Rosa Parks¹⁵⁴ and the civil rights movement helped eliminate and that which the plaintiffs in *Regal* fought against are comparable.¹⁵⁵

Wheelchair seating that is provided in the first row of a movie theater, while not physically separated from the general seating, constitutes a form of discrimination.¹⁵⁶ Compared with that of the general public, the wheelchair seating area is not provided comparable lines of sight due to inferior viewing angles.

Judge Kleinfeld discounts the majority's view of a wheelchair ghetto before even attempting to attack the notion that comparable viewing angles must be read within the "lines of sight" language. Instead, Judge Kleinfeld justified the placement of the wheelchair seating provided in the flat, front portion of the theater due to theater owners' need to comply with other requirements, such as those for access and emergency exits.¹⁵⁷ The dissent asserts that the majority disregards these necessary concerns, and which are sure to complicate any construction plan.¹⁵⁸ The majority does not, however, ignore these requirements under the regulation, but instead gives the lines-of-sight requirement equal weight. Compliance with all the

¹⁵⁴ *Id.* Rosa Parks was born on February 4, 1913 in Tuskegee, Alabama. *Id.* Mrs. Parks, a black woman, became part of the civil rights movement through one simple act. *Id.* On December 1, 1955, Mrs. Parks got on a bus to go home in Montgomery, AL., and sat down in the first row of the bus designated for blacks. *Id.* But as the bus became more crowded, Mrs. Parks was ordered to give up her seat to a white woman. *Id.* She refused. *Id.* Although Mrs. Parks was arrested, her choice to remain seated led to the disintegration of segregation in the South. *Id.*

¹⁵⁵ The Access Board website, available at <http://www.access-board.gov/about/ADA.htm> (last visited Feb. 15, 2004). Indeed, the ADA was even modeled after historic laws preventing race and gender based discrimination. *Id.*

¹⁵⁶ *Indep. Living Res. v. Or. Arena Corp.*, 982 F.Supp. 698, 712 (D. Or. 1997). A wheelchair ghetto must be thought of in terms of desirability. *Id.* The court stated in *Independent Living Resources v. Oregon Arena Corp.* that an arena owner can't create a wheelchair ghetto that consigns wheelchair-bound patrons to the least desirable seats in the venue. *Id.*

¹⁵⁷ *Regal Cinemas II*, 339 F.3d at 1135 (Kleinfeld, J., dissenting).

¹⁵⁸ *Id.* In addressing the importance of these other concerns which theater owners must comply with, the dissent states: "The 'integral part' requirement prohibits a separate and noncontiguous wheelchair ghetto, the companion seating provision prohibits separation of the disabled from friends and family, and the access route provision assures that the disabled can get in and out of the movie theater conveniently and safely (which may require that they be in the flat area in front)." *Id.* For further discussion of the integration requirement and its advantages in solving the sight line problems in question, see *Civil Rights -- Americans With Disabilities Act -- Ninth Circuit Holds That Movie Theaters Must Provide Comparable Viewing Angles For Patrons in Wheelchairs*, 117 Harv. L. Rev. 727 (2003).

requirements under section 4.33.3 is no doubt an architectural and construction nightmare, however, this is no reason to ignore one of the provisions merely for simplicity and ease. More important, it is unnecessary to ignore the lines-of-sight requirement.

The dissent's argument that wheelchair seating is placed in the front of the theater in order to comply with all of the requirements under section 4.33.3 is unjustified. In *Lara*, there were two Tinseltown theaters whose design was not contested, which provided wheelchair seating in the back of the auditorium as well as in the front, and was accessible by means of an elevator.¹⁵⁹ Similarly, one of *Regal's* theaters had four auditoriums that provided wheelchair-accessible seating in the stadium riser section.¹⁶⁰ Assuming that those theaters complied with the other requirements of section 4.33.3, providing wheelchair seating more options than the front row while maintaining compliance with the regulation as a whole is possible.

C. COMPARABLE TO WHAT?

Judge Kleinfeld correctly stated that the meaning of "comparable" as it relates to the "lines of sight" language in the regulation is the heart of this case.¹⁶¹ Judge Kleinfeld defined "comparable" as "similar or equivalent" and disagrees with the DOJ's interpretation that "comparable" means "equivalent to or better than fifty percent of the seats."¹⁶² The dissent poses the question, "comparable to what?"¹⁶³ Judge Kleinfeld opined that reading "comparable" to mean "similar or equivalent to" the viewing angles provided for non-wheelchair seating is more natural than defining the word to mean "better than" the non-wheelchair seating.¹⁶⁴ While one might agree with Judge Kleinfeld's interpretation of the meaning of "comparable" as a status of equivalence instead of superiority, the means with which Judge Kleinfeld rationalized and implemented his interpretation is flawed.

¹⁵⁹ *Lara I*, 1998 WL 1048497, at *1 n.1-2.

¹⁶⁰ *Regal Cinemas II*, 339 F.3d at 1128 n.3.

¹⁶¹ *Id.* at 1135 (Kleinfeld, J., dissenting).

¹⁶² *Id.*, citing *The American Heritage Dictionary* 300 (2d ed. 1982).

¹⁶³ *Regal Cinemas II*, 339 F.3d at 1135 (Kleinfeld, J., dissenting).

¹⁶⁴ *Id.*

Judge Kleinfeld pointed out that viewing angles differ with every seat in the auditorium, and that there is no possible way for a wheelchair-bound patron's line of sight to be comparable to that of all these seats.¹⁶⁵ Further, Judge Kleinfeld agreed with the Fifth Circuit and stated that seating preferences in movie theaters are highly subjective and vary with each individual.¹⁶⁶ In light of this subjectivity, Judge Kleinfeld stated that the wheelchair seating in the front of the theater is comparable to the non-wheelchair seating also in the front of the theater, which is preferred by the patrons who like to sit up front.¹⁶⁷ According to the dissent, this meets the regulation's requirements.¹⁶⁸ Judge Kleinfeld fails to view seating in the first few rows of a movie theater as undesirable, stating that "[i]f the seats up front, or in the back, were uniformly considered undesirable, theaters would have to charge less for them. They don't."¹⁶⁹ While the front row seating in a movie theater may not be uniformly considered undesirable by moviegoers everywhere, it is evident that the seats are clearly not the best in the auditorium and not favored by most movie patrons.

Anyone who has gone to see a popular movie on opening night knows that right before the movie sells out, the seats in the first few rows are always the last to be filled.¹⁷⁰ This is a consideration moviegoers take into account when determining when they should arrive at a theater. Moviegoers know that the longer they delay their arrival, the greater the possibility that the preferable seats will already be taken. They know

¹⁶⁵ *Id.* at 1136 (Kleinfeld, J., dissenting). Kleinfeld notes that to do this would require the "scattering of wheelchair seating that the 300-seat provision [of § 4.33.3] expressly avoids requiring in small theaters." *Id.*

¹⁶⁶ *Id.* In describing the ways in which the preferences of movie watchers differ, Kleinfeld stated the following: "Some people like to sit up front, for maximum size of picture and stereo effect of the sound, and to avoid distractions from people in front of them. Some people like to sit in back, for the greater height and sense of separation from the picture. Some like the aisles, so they can get out easily to go to the bathroom or the popcorn stand. Some like the center, so they won't be distracted by the people who get up during the movie to go [to] the bathroom or the popcorn stand." *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *United States v. AMC Entm't, Inc.*, 232 F. Supp. 2d 1092, 1105 n.15 (C.D. Cal. 2002). In March 1997, a trial attorney for the DOJ, Joe Russo, gave a presentation to theater owners on the requirements of § 4.33.3. *Id.* at 1105. In regards to front row seating, Russo stated in his presentation that "these are not the first seats that go when you go to the movies. Nobody runs into the movie theater to see Terminator 200 and runs to the front seat so they can get neck strain like this." *Id.* at 1105 n.15.

they will be forced to sit closer to the screen than they would prefer, resulting in a diminished movie-going experience. Non-disabled patrons have the ability to improve their seating and overall movie-watching experience. In contrast, wheelchair-bound patrons are confined to a particular location and position, unable to improve their overall movie experience. Moreover, wheelchair-bound patrons who are forced to sit in the front row have experienced dizziness, nausea, headaches, or blurred vision as a result of their wheelchair confinement and front-row seating, whereas non-disabled patrons are able to avoid against these problems either by reclining or slouching in their seats.¹⁷¹

In the end, the dissent's argument, that the wheelchair seating provided up front is comparable to the other seating provided to the patrons who prefer to sit up front, is unpersuasive. The lines of sight provided within these seats are distinguishable because non-disabled patrons have the ability to recline and slouch, whereas due to their disability, wheelchair-bound patrons generally do not share the same flexibility. The dissent sidestepped this issue simply by stating that theater owners cannot command wheelchair manufacturers to construct wheelchairs with the same reclining tilt as movie theater seats enjoy.¹⁷² The dissent's reliance on this argument is misplaced. Theaters should recognize the limits disabled people face and provide wheelchair seating in areas of the theater that would not require the patrons to recline or slouch. The regulations should work towards the disabled patrons' benefit and not to their detriment.

The dissent asserts that providing more accommodating seating for wheelchair-bound patrons is not within the theaters' control, stating that "[t]hose who use wheelchair spaces in a movie theater bring their own chairs."¹⁷³ While the dissent attempts to draw attention to the lack of control a theater has over the construction and constraints of a wheelchair, in effect Judge Kleinfeld is stating that these individuals are disabled, and there is nothing he can do about that.¹⁷⁴ This is exactly the

¹⁷¹ See *supra* note 92 and accompanying text.

¹⁷² *Regal Cinemas II*, 339 F.3d at 1137 (Kleinfeld, J., dissenting).

¹⁷³ *Id.*

¹⁷⁴ *Id.* The dissent stated the following: "The wheelchair manufacturer and purchaser in substantial part control the vertical viewing angle, and the wheelchair space

type of discrimination the ADA was created to protect against. Unlike Judge Kleinfeld's design, comparability must be interpreted in light of the purpose of Title III of the ADA. In accord with the DOJ's interpretation, lines of sight should be considered comparable if they provide disabled persons' equal enjoyment of the benefits of public accommodations, or in this case, the movie-watching experience.¹⁷⁵

D. WHEELCHAIR SEATING BEFORE THE STADIUM STYLE

Judge Kleinfeld pointed out that section 4.33.3 did not address the issue or prohibit wheelchair seating in the front row of a theater before the advent of stadium-style theaters.¹⁷⁶ Consequently, the court, as Judge Kleinfeld contends, may not read into it now as doing such.¹⁷⁷ This criticism of the majority's argument, however, ignores the freedoms that the traditional theater design offered to handicapped patrons. In the traditional sloped-theater design, persons in wheelchairs had more options. They could either use the handicapped spaces provided by the theater, wherever they might be, or they could park their chair anywhere along the theater aisle that best suited their viewing preference. With the stadium-style theater design, handicapped patrons lose these options and are forced to use only the spaces provided by the theater.

E. NO GUIDANCE TO THEATER OWNERS

Judge Kleinfeld stated that the main problem with the majority's decision leaves theater owners unsure of what they need to do in order to comply with section 4.33.3 of the

provided by the movie theater controls the horizontal angle." *Id.* The gist of Kleinfeld's statement is that the movie theaters' control is limited to an extent. *Id.* While this is, of course, true, it is still within the theaters' control to alleviate the concerns and discomforts felt by wheelchair-bound patrons by providing more advantageous seating locations.

¹⁷⁵ 42 U.S.C. 12182(a) (2000); *see also* 42 U.S.C. 12182(b)(1)(A)(ii) (2000). In its amicus curiae brief, the DOJ asserted, "[t]he quality of the viewing experience is quite relevant to whether there is 'equal enjoyment' of the benefits of a movie theater. A wheelchair user who must watch a movie from an extreme angle that causes significant discomfort and distortion of the picture has not been afforded 'equal enjoyment' of the movie if most other patrons are able to watch the film at more comfortable angles." *Appellants Brief Urging Reversal* at 14.

¹⁷⁶ *Regal Cinemas II*, 339 F.3d at 1137 (Kleinfeld, J., dissenting).

¹⁷⁷ *Id.*

ADAAG.¹⁷⁸ Judge Kleinfeld further stated he would have preferred a “floorplan” from the majority with which theater owners might better interpret its holding.¹⁷⁹ It is important to note that throughout his dissent, Judge Kleinfeld criticized the majority for interfering with the rulemaking process.¹⁸⁰ Yet, the Circuit Judge requests more specificity from the court in regards to a movie theater’s proper compliance with section 4.33.3.¹⁸¹ According to the dissent, the majority’s decision leaves thousands of theaters violating section 4.33.3 and must begin a reconstruction process with only a vague outline of what they need to do in order to comply with the regulation.¹⁸² The majority’s decision however, does not lack such specificity as Judge Kleinfeld asserts.

Kathleen L. Wilde of the Oregon Advocacy Center in Portland, who represented the plaintiffs in *Regal*, said that the decision requires Regal and other theaters to “retrofit their theaters so that wheelchair seats can be among the stadium style seating, which is so highly desired.”¹⁸³ Indeed, is this not all that is needed? Providing wheelchair seating in the stadium section will comply with the majority’s decision and provide wheelchair patrons lines of sight to the screen that are comparable with those provided to able-bodied patrons. The majority decision in *Regal*, therefore, was indeed sufficient.

IV. THE *HOYTS* DECISIONS

At this time, only the Fifth, Ninth and most recently the Sixth Circuit have addressed section 4.33.3 of the ADAAG and reached a conclusion as to whether viewing angles should be included within the meaning of “lines of sight comparable.”¹⁸⁴

¹⁷⁸ *Id.* at 1134 (Kleinfeld, J., dissenting).

¹⁷⁹ *Id.* at 1137 (Kleinfeld, J., dissenting).

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.* at 1134 (Kleinfeld, J., dissenting). In Kleinfeld’s opinion, “[i]t is irresponsible to impose on a country a decision that will require of an industry so much reconstruction, without clear guidance on what must be done.” *Id.*

¹⁸³ Ragged Edge Online Magazine, *Moviegoers in Wheelchairs Win Victory in Oregon*, available at http://www.ragged-edge-mag.com/drn/08_03.shtml#591 (last visited Feb. 15, 2004). See also David Watson, *Ninth Circuit Rules: Movie Theaters May Not Relegate Wheelchair Patrons to Front*, Metropolitan News-Enterprise, available at <http://www.metnews.com/articles/oreg081403.htm> (last visited Feb. 15, 2004).

¹⁸⁴ See generally *Lara II*, 207 F.3d 783; *Regal Cinemas II*, 339 F.3d 1126; *United States v. Cinemark USA, Inc.*, 348 F.3d 569 (6th Cir. 2003).

Several district courts, however, have grappled with the issue.¹⁸⁵

A. *UNITED STATES V. HOYTS CINEMAS CORPORATION*

In 2000, the United States Attorney's Office sued two major Massachusetts-based movie-theater chains.¹⁸⁶ The government sued the theater companies in a Massachusetts District Court alleging that they designed, built, and operated movie theaters that denied equal access to wheelchair users under section 303(a)(1) of the ADA, 42 U.S.C. Section 12183(a)(1), and of course, Section 4.33.3 of the ADAAG.¹⁸⁷ In *United States v. Hoyts Cinemas Corporation*,¹⁸⁸ the disputed theater designs were similar to those in *Lara* and *Regal*. The design provided wheelchair seating either exclusively in the traditional seating section located in front of the stadium section, or, alternatively, in the front row of the stadium section on the access-aisle that separates the two sections.¹⁸⁹ The designs of the theaters, however, were not the only similarities between *Hoyts* and *Regal*.

¹⁸⁵ See *Hoyts Cinemas*, 256 F. Supp. 2d 73; *Meineker*, 216 F. Supp. 2d 14; see also *United States v. AMC Entm't, Inc.*, 232 F. Supp. 2d 1092 (C.D. Cal. 2002), in which the California district court found *Lara*'s reasoning that "lines of sight comparable" require only an "unobstructed view," to be unpersuasive. *Id.* at 1110. *AMC* noted that "[t]he Fifth Circuit relied on other references in the Code of Federal Regulations to 'lines of sight' and concluded that in each instance the reference concerned the presence or absence of obstructions." *Id.* However, *AMC* failed to see how the regulations which dealt with the placement of antennae, what constitutes "direct supervision," and operation of snowmobiles by juveniles under the age of 16, had any applicability in this instance. *Id.* The following cases described within this portion of my Note are included to offer a perspective on how district courts in other circuits have addressed § 4.33.3 of the ADAAG.

¹⁸⁶ *Federal Judge Rules for Stadium Seating for Wheelchairs*, New England News, available at <http://web1.whdh.com/news/articles/local/A11128/> (last visited Feb. 15, 2004) The two movie theater companies were National Amusements Inc., based in Dedham, and Hoyts Cinemas Corp., based in Boston. *Id.* Both theater companies were ranked in 2000 among the ten largest movie theater companies in the country. *Id.* The companies both began constructing stadium-style theaters in 1997. *Id.*

¹⁸⁷ *Hoyts Cinemas*, 256 F. Supp. 2d at 75. In *Hoyts*, the government originally brought two separate civil actions against each of the theater companies. *Id.* Since the two complaints were virtually identical, the Massachusetts district court consolidated the two actions. *Id.* The complaint set forth two counts. *Id.* Count I is discussed in this Note. Count II is not discussed and was dismissed by the court on August 22, 2001. *Id.*, see also *United States v. Nat'l Amusements, Inc.*, 180 F. Supp. 2d 251, 262 (D. Mass. 2001).

¹⁸⁸ *Hoyts Cinemas*, 256 F. Supp. 2d 73.

¹⁸⁹ *Id.* at 79. A majority of the designs provided wheelchair seating both on the access-aisle separating the traditional and stadium-style sections, and in the traditional section as well. *Id.* A minority of theaters provided wheelchair seating only in

The *Hoyts* court's decision, mentioned in a footnote by the court in *Regal*, similarly rejected the Fifth Circuit's reasoning in *Lara*.¹⁹⁰ In *Hoyts*, the government argued that the reasoning in *Lara* and its progeny were flawed for several reasons.¹⁹¹ First, the government contended that the Fifth Circuit was incorrect in determining that lines of sight were defined only in terms of an unobstructed view.¹⁹² According to the government, the Fifth Circuit offered no factual support from the regulation's language to justify such a ruling.¹⁹³ Second, in making a historical analysis, the Fifth Circuit relied on Technical Assistance Manuals that were written before the advent of stadium-style theaters.¹⁹⁴ Third, the Fifth Circuit did not defer to the DOJ's interpretation of its own regulation.¹⁹⁵ Finally, the court in *Lara* selectively limited its analysis to certain portions of the regulation in question.¹⁹⁶ As a result, the court ignored the sections of the proposed regulation that considered viewing angles when determining whether lines of sight were comparable.¹⁹⁷

The *Hoyts* court agreed with the government's arguments concerning *Lara's* interpretation of "lines of sight comparable."¹⁹⁸ *Hoyts* especially disagreed with *Lara's* reasoning, that lines of sight need only provide unobstructed views, given the regulation's express language requiring comparability to those

the traditional style section. *Id.* And, a small minority of these designs offered wheelchair accessible seating only in the front row of the traditional style section. *Id.*

¹⁹⁰ *Regal Cinemas II*, 339 F.3d at 1133 n.8.

¹⁹¹ *Hoyts Cinemas*, 256 F. Supp. 2d at 84. At the time of this decision, the Ninth Circuit Court of Appeals had not yet decided *Regal*, therefore as *Lara's* progeny, the court lists the Oregon district court decision in *Regal*, as well as *United States v. Cinemark U.S.A., Inc.*, Case No. CIV.A.99-705, slip op. (N.D. Ohio Nov. 19, 2001). *Id.*

¹⁹² *Hoyts Cinemas*, 256 F. Supp. 2d at 84.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 84 n.8. In a footnote, the *Hoyts* court provided the language of the regulation, which was omitted by the *Lara* court. *Id.* The omitted section of the regulation stated as follows: "As stadium-style theaters are currently designed, patrons using wheelchair spaces are often relegated to a few rows of each auditorium, in the traditional sloped floor area near the screen. Due to the size and proximity of the screen, as well as other factors related to stadium-style design, patrons using wheelchair spaces are required to tilt their heads back at uncomfortable angles and to constantly move their heads from side to side to view the screen. They are afforded inferior lines of sight to the screen." *Id.*, quoting ADDAG for Buildings and Facilities, 64 Fed. Reg. at 62,277.

¹⁹⁸ *Hoyts Cinemas*, 256 F. Supp. 2d at 85.

of the general public.¹⁹⁹ In the end, the court did not grant the retroactive injunctive relief sought by the government.²⁰⁰ Instead, *Hoyts* mandated that relief should be granted only prospectively.²⁰¹ Despite this, if the theaters were to make any changes to their establishments (including construction or refurbishment) that required a building permit, the theaters would then be required to comply with section 4.33.3 and provide wheelchair seating in the stadium section.²⁰² In an effort to alleviate any confusion, the court explicitly stated that “wheelchair seating cannot be located solely in the traditional section, nor solely in the access-aisle, nor solely in both the traditional section and access-aisle” if compliance with section 4.33.3 of the ADAAG is to be met.²⁰³ This decision is pending appeal in the First Circuit.²⁰⁴

B. *MEINEKER V. HOYTS CINEMAS CORPORATION*

In 1998, plaintiffs Susan Meineker and Sybil McPherson brought a suit against Hoyts Cinemas Corporation in the United States District Court for the Northern District of New York.²⁰⁵ In *Meineker v. Hoyts Cinemas Corporation*,²⁰⁶ the plaintiffs alleged a violation of Title III of the ADA based on the wheelchair seating configuration at the defendant’s theater, located in the Crossgates Mall in Albany, New York.²⁰⁷ Similar to the plaintiffs in *Lara* and *Regal*, Meineker and McPherson are disabled and forced to use wheelchairs.²⁰⁸ Further, each reported difficulty viewing the screen from the wheelchair seats located in the front of the theater directly under the screen, and suffered discomfort from the constant seat-shifting and neck-craning required in order to view the movie.²⁰⁹ Due to

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 91.

²⁰¹ *Id.*

²⁰² *Id.* at 93.

²⁰³ *Id.*

²⁰⁴ *Hoyts Cinemas*, 256 F. Supp. 2d 73, *appeal pending*, No. 03-1646 (1st Cir. argument scheduled for after July 31, 2003).

²⁰⁵ *Meineker*, 216 F. Supp. 2d 14.

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 15.

²⁰⁸ *Id.*

²⁰⁹ *Id.* The court noted that “[s]ubsequent to the commencement of this litigation, the wheelchair seating was renovated between November 2000 and March 2001. The wheelchair seating was relocated to the rear of the floor section behind several rows of

the lack of wheelchair seating in the stadium section of the theater, the plaintiffs claimed that the wheelchair patrons were not offered lines of sight comparable to those provided to the general public as section 4.33.3 of the ADAAG requires.²¹⁰

In analyzing the straightforward question surrounding the meaning of “lines of sight,” the district court in *Meineker* recognized the decisions of the cases that already dealt with the issue.²¹¹ Within these prior rulings, the *Meineker* court noted that the “lines of sight” language does not impose a viewing-angle requirement, but mandates only an unobstructed view.²¹² Nonetheless, the district court held that the language of the regulation requires more than just an unobstructed view since the word “comparable” provides a qualitative requirement in the regulation.²¹³ Indeed, the presence of the word “comparable” requires that the sight line to the screen be “similar” and not merely “similarly unobstructed,” compared with the sight lines offered to the general public.²¹⁴

Notwithstanding the court’s position that section 4.33.3 requires more than just an unobstructed view, and disagreeing with the Fifth Circuit, the *Meineker* court held that the viewing angles offered to wheelchair-bound patrons were “comparable to those afforded to a significant portion of the general public.”²¹⁵ The court reached this conclusion in light of the defendant’s renovations to the wheelchair seating area,²¹⁶ renovations which included moving the wheelchair seating to the rear of the floor section, away from the front of the theater where plaintiffs were originally forced to sit.²¹⁷ The court stated that if the defendants had not relocated the wheelchair seating at

general public seating, and as close to the center of the theater as possible.” *Id.* (citations omitted). This was a critical factor to the court’s subsequent decision.

²¹⁰ *Id.* at 16. The plaintiffs argued additionally that the wheelchair seating violates the ADA since (1) the wheelchair seating is not an integral part of the fixed seating plan, (2) the theaters provide no wheelchair access to the stadium seating area, and (3) the wheelchair seating is “separate and unequal.” *Id.*

²¹¹ *Id.* at 17. At the time of the district court’s decision, the cases available were the Fifth Circuit decision in *Lara*, the Oregon district court decision in *Regal*, as well as *United States v. Cinemark U.S.A., Inc.*, Case No. CIV.A.99-705, slip op. (N.D. Ohio Nov. 19, 2001). *Id.*

²¹² *Meineker*, 216 F. Supp. 2d at 18.

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ See *supra* note 206.

the Crossgates theaters, "it would unquestionably have been in violation of the ADA."²¹⁸ Less than one year later, the district court's decision was vacated by the United States Court of Appeals for the Second Circuit, and sent back to the lower courts on remand.²¹⁹

On appeal, the plaintiffs maintained that the defendant was not in compliance with section 4.33.3 due to its failure to offer wheelchair patrons comparable lines of sight, as well as its failure to make wheelchair seating an integral part of the fixed seating plan.²²⁰ The purpose for the remand concerns the issue of whether deference should be given to the DOJ's interpretation of section 4.33.3.²²¹ This issue arose for the first time on appeal when the DOJ first entered the case as *amicus curiae* at the request of the Court of Appeals during oral arguments.²²² Besides determining if the DOJ's interpretation is entitled to deference, the district court will need to factually analyze whether the defendant had reasonably sufficient notice of the interpretation to mandate compliance with the regulation.²²³

Although the Second Circuit failed to render a decision regarding the district court's analysis, the order of the Second Circuit left little doubt as to which direction it was leaning. In addition to the issues of deference and notice, the Second Circuit outlined six specific factual issues for the district court to

²¹⁸ *Meineker*, 216 F. Supp. 2d at 18 n.4. In footnote 4, the court went into significant detail noting the reason the comparability requirement of the regulation should encompass viewing angles. *Id.* The court stated the following: "This requirement is necessary to address the potential situation where a defendant has relegated wheelchair patrons to a portion of the theater that provided truly inferior viewing angles and limited or no seating for the general public--such as was the case at the start of this litigation where wheelchair patrons were relegated to the absolute worst seats at the very front of the theaters. It would defy common sense to describe the lines of sight afforded by such viewing positions as 'comparable' merely because they were unobstructed." *Id.*

²¹⁹ *Meineker v. Hoyts Cinemas Corp.*, No. 02-9034, 2003 WL 21510423, *26 (2nd Cir. July 1, 2003).

²²⁰ *Id.* at 22.

²²¹ *Id.* at 24. The court notes that remand is necessary since the defendant argued that all the evidence cited to by the DOJ is outside the record on appeal, and that the defendant lacked reasonable notice of the DOJ's position. *Id.* at 24-25. The Second Circuit stated that these arguments require a fact finding by the district court. *Id.* at 25.

²²² *Id.* at 24. Besides the DOJ, the Second Circuit also requested letter briefs addressing the issue of deference to and notice of the DOJ's interpretation of § 4.33.3 from the National Association of Theater Owners, and from the defendant. *Id.* at 25.

²²³ *Id.* at 25.

determine on remand.²²⁴ After almost each one, the court provided a footnote in which it pointed the district court in the appropriate direction, and practically gave them the answers to the factual questions in which they were assigned.²²⁵ Taken together, the footnotes state that the defendant and the defense's architect endorsed the SMPTE Engineering Guidelines (maintained as an appropriate industry standard by the court), which described levels of physical discomfort suffered by viewers based on vertical viewing angles.²²⁶ Given the court of appeal's deference to the SMPTE guidelines, it is highly likely that they want to find in favor of the plaintiffs in this case, and thereby bring the Second Circuit into accord with the Ninth Circuit. Only time will tell whether this prediction will become a reality.

V. CONCLUSION

The Ninth Circuit's decision in *Regal* reaffirmed the strength of the ADA and its purpose. After all, holding that "lines of sight comparable" encompass a viewing-angle requirement is not only reasonable in light of common sense, but is in accord with the general mandate of the ADA that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of ... any place of public accommodation."²²⁷ Wheelchair-bound moviegoers forced to sit in the front row of a movie theater lack the opportunity to gain the full and equal enjoyment of the movie-watching experience as compared with the general public. The Ninth Circuit in *Regal* recognized this injustice and remedied it.

²²⁴ *Id.* The issues were the following: "(1) Hoyts's notice of, and intent to comply with, the requirements of the ADA at the time of construction or renovation of the Crossgates theaters; (2) Hoyts's position in previous legal communications (submitted to administrative or judicial entities) regarding lines of sight; (3) the knowledge of Hoyts's architect at the time of construction or renovation of these facilities, including his understanding of lines of sight; (4) the understanding of Hoyts's officials of the meaning of lines of sight; (5) the industry's understanding of the terms used in § 4.33.3, including 'comparable lines of sight' at the time of construction or renovation of these facilities; and (6) customer seating preference data." *Id.*

²²⁵ *Id.* at 25 n.6-10.

²²⁶ *Id.* at 25 n.7-10.

²²⁷ 42 U.S.C. § 12182(a) (2000).

In the *Regal* case, a petition for certiorari to the United States Supreme Court was filed on October 27, 2003.²²⁸ In light of the circuit split, it is likely that *Regal* will be heard by the United States Supreme Court.²²⁹ That aside, the *Regal* decision has dealt the first blow to the disability discrimination practiced in a majority of stadium-style theaters around the nation. It is hoped it will not be the last.

JOSHUA D. WATTS*

²²⁸ *Regal Cinemas II*, 339 F.3d 1126, petition for cert. filed, 72 U.S.L.W. 3310 (U.S. Oct. 27, 2003) (No. 03-641).

²²⁹ David Watson, *Ninth Circuit Rules: Movie Theaters May Not Relegate Wheelchair Patrons to Front*, Metropolitan News-Enterprise, available at <http://www.metnews.com/articles/oreg081403.htm> (last visited Feb. 15, 2004). Lawyer Greg Hurley of Kutak Rock in Irvine, CA expressed this view. *Id.* Hurley filed an amicus brief in the case on behalf of the National Association of Theater Owners. *Id.*

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